

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRLEY WILBANKS

PLAINTIFF

VS.

CIVIL NO. 1:97CV18-JAD

DALKON SHIELD CLAIMANTS TRUST

DEFENDANT

MEMORANDUM OPINION

Defendant Dalkon Shield Claimants' Trust has moved for summary judgment on the ground that plaintiff Wilbanks' claims are time barred. After review of the briefs of the parties and the documents in support of the motion and response, the court is of the opinion that the motion should be **granted**.

Plaintiff's physician inserted a Dalkon Shield into plaintiff on November 5, 1971. Plaintiff became pregnant in 1972, and experienced "excruciating pain" and a "feeling of a foreign object" in her body which was "sticking" her and causing her pain. Plaintiff expressed to her physician and a friend that she thought the Dalkon Shield might be the cause of her physical problems. The pregnancy ended in a spontaneous miscarriage in September 1972. A D & C was then performed, and the Dalkon Shield was allegedly removed from Wilbanks' uterus during that procedure. She testified at her deposition that she believed that the Shield had caused the miscarriage.

In the fall of 1974 plaintiff became pregnant again and experienced severe cramps, and her physicians confirmed her suspicions that her problems might have been caused by her prior use of the Dalkon Shield. Following this birth, in April 1975, her physician told her she had

some muscle damage which again she was convinced had been caused by the Dalkon Shield.

Upon the advice of her doctor, plaintiff underwent an elective tubal ligation.

In 1978 Plaintiff's physicians performed a D & C as treatment for heavy menstrual flow and severe cramps, and in January 1980, a complete hysterectomy. Wilbanks testified that at the time she discussed with her physicians her belief that the Dalkon Shield was responsible for both the hysterectomy and for the excessive bleeding and cramping, but none could positively confirm the connection. Wilbanks did not file her claim with the Dalkon Shield Claimants' Trust until January 21, 1986.

The claims asserted by plaintiff are subject to a six-year statute of limitations (§15-1-49, §75-2-725 Miss. Code Anno.). For purposes of this discussion, the court will assume that the Dalkon Shield did, in fact, cause the problems which plaintiff suffered. The question then becomes did plaintiff discover or by reasonable diligence should she have discovered her injury prior to January 21, 1980?

While plaintiff contends that A. H. Robbins, maker of the Dalkon Shield, may well have concealed certain facts about certain dangers caused by use of the shield, there is no evidence that this concealment affected Wilbanks in any way. Wilbanks by her own testimony has made it clear that she knew or reasonably had knowledge of the connection between her use of the shield and her physical problems. She discussed her convictions that the shield was responsible with each physician at every step along the way of her physical care. No one physician positively confirmed or denied that the Shield was the cause but several did tell Wilbanks as early as 1974 or 1975 that such was possible.

In order to prevail on a claim of fraudulent concealment the plaintiff must show some act

or conduct of an affirmative nature designed to prevent, and which does prevent, discovery of the claim. *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss. 1988). This conduct must be designed to prevent an injured party such as plaintiff from making her claim. While defendant may have misrepresented the efficacy of the Dalkon Shield, the court has not been presented any evidence that defendant concealed information or misrepresented facts to the plaintiff. In fact, she had no direct communication with defendant. Moreover, plaintiff can point to no evidence that defendant acted in any way to prevent her from discovering her cause of action. Plaintiff's assertions concerning defendant's misrepresentations and promotion of the product does not amount to fraudulent concealment of her cause of action.

Finally, there is no evidence of a fiduciary relationship between plaintiff and defendant. In such a case, mere silence or nondisclosure of material facts does not support a finding of fraudulent concealment. *Wilson v. Retail Credit Co.*, 438 F.2d 1043, 1045 (5th Cir. 1971); *Thomas v. Ford Motor Credit Corp.*, 2:95CV309-P-G (S.D.Miss., Jan. 10, 1997).

Despite her strong belief that the shield was the basis of her problems and the acknowledgement of her physicians that her belief might indeed be well-founded, plaintiff took no steps to seek expert medical opinions or to consult an attorney to inquire if she had a legal claim against the manufacturer. A cause of action accrues and the limitations period begins to run when the plaintiff can be held to have had knowledge of the injury (*Kemp v. G.D. Searle & Co.*, 103 F.3d 405, 408 (5th Cir. 1997), when she has "discovered, or by reasonable diligence should have discovered, the injury." *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss. 1990). Wilbanks was clearly on notice of her injury and the possible cause more than six years prior to the filing of her claim. Plaintiff has not shown that she exercised reasonable diligence in

the pursuit of her convictions.

For these reasons, the motion of defendant for summary judgment will be **granted**. A final judgment in accordance with this opinion will be separately issued.

THIS ____ day of June, 1998.

UNITED STATES MAGISTRATE JUDGE